Fremont, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PERRY'S PLANTS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 76-CE-46-M 78-CE-l-S 5 ALRB No. 17

DECISION AND ORDER

On June 12, 1978, Administrative Law Officer (ALO) Robert A. D'Isidoro issued the attached Decision and Order in this proceeding. Thereafter, Respondent and the General Counsel each filed timely exceptions with a supporting brief. The Charging Party and the General Counsel each filed a brief in reply to Respondent's exceptions.

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided to

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affirm the rulings, findings,[1/] and conclusions of the ALO and to adopt his recommended Order.

Dated: March 16, 1979

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

[1/] The ALO's Decision is hereby corrected to reflect that: (1) Jorge Valenzuela was transferred to the soil room in December 1975, not 1976 (ALO Decision, p. 7); (2) Michael Proffitt, rather than Steven Glover, asked Sister DeWolfe, "Where is your friend, Jorge?" CALO Decision, p. 8); and (3) "Fujimoto" and "Almazan" were misspelled in the Decision.

CASE SUMMARY

Perry's Plants, Inc.

5 ALRB No. 17
Case Nos. 76-CE-46-M
78-CE-l-S

ALO DECISION

The ALO concluded that Respondent violated Labor Code Section 1153 (c) and (a) by discharging its employees Jorge Valenzuela and John Almazan. The ALO found that Respondent had knowledge that Valenzuela was an active union member and that such work problems as he had did not justify his discharge. The ALO further found that Respondent's asserted reason for discharging Almazan, unreported absence from work, was pretextual.

The ALO concluded that Doris Jorgenson was a supervisor and agent of Respondent within the meaning of the Act, and that her violations of Labor Code Section 1153(a), by engaging in unlawful interrogation of employees and surveillance of their union activities, are therefore attributed to Respondent. Respondent excepted to the ALO's conclusions, as to Doris Jorgenson's status, but conceded that if she was a supervisor and agent her activities violated the Act.

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the ALO and adopted his recommended remedial Order.

REMEDIAL ORDER

Respondent was ordered to cease and desist from its unlawful discrimination, surveillance and interrogation, to offer Valenzuela and Almazan reinstatement and to make them whole for any losses they may have suffered, and to post, mail and read the attached Notice to Employees.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of PERRY'S PLANTS, INC. Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 76-CE-46-M 78-CE-l-S

BETTY 0. BUCCAT, ESQ., Sacramento, California, for the General Counsel

ROBERT J. STUMPF, ESQ. and FREDERICK A. MORGAN, ESQ. of BRONSON, BRONSON & McKINNON, San Francisco, California, for the Respondent

DIANNA LYONS, ESQ., Sacramento, California, for the Intervenor-Charging Party.

DECISION

Statement of the Case

ROBERT A. D'ISIDORO, Administrative Law Officer: These consolidated cases were heard before me in Hayward, California, commencing on April 24, 1978, and concluding on May 2, 1978. The complaint charges that Respondent violated the Agricultural Labor Relations Act (hereafter "the Act") in that it discriminatorily discharged employees Jorge Valenzuela and John Almazan, and by and through its agent and supervisor, Doris Jorgenson,

engaged in surveillance and interrogation of its employees regarding their union membership, views, and sympathies.

All parties were given full opportunity to participate in the hearing on the merits, and to present witnesses, documentary evidence and argument. Prior to the presentation of evidence, the parties agreed to amend the complaint by interlineation and to the oral answer to the complaint, on the record, by Respondent. During the course of the hearing, General Counsel's motion to amend the complaint to conform to the evidence by inserting the words "engaged in surveillance and" on line 22, page 3 (see Exhibit GC-1A) was granted.

Upon the entire record herein, including testimony, admissions, stipulations, and exhibits, upon my observation of the demeanor and credibility of each of the witnesses, and upon consideration of the briefs submitted by all parties after the close of the hearing, I make the following findings of fact, conclusions of law, and recommended remedy.

Findings of Fact and Conclusions of Law

I. Jurisdiction

Pursuant to the stipulation of the parties, I find that Respondent's true name is American Garden Perry's Plants, Inc.; that it is a corporation engaged in the nursery business with its main office in La Puente, California, and branches in Fremont, California, Carpinteria, California, and Phoenix, Arizona; that it is an agricultural employer within the meaning of Section 1140.4 (c); that its employees are agricultural employees within

the meaning of Section 1140.4 (b); and that the United Farm Workers of America, AFL-CIO (hereafter "UFW") is a labor organization representing agricultural employees within the meaning of Section 1140.4 (f) of the Act.

II. Respondent's "Technical" Affirmative Defense

Respondent asserts that the original charge in Case No. 76-CE-46-M (Jorge Valenzuela's discharge) "was not timely filed"[1/] because it was filed in Sacramento rather than in Salinas and "that filing arguably was of no effect." Respondent cites Section 20208 of the ALRB Regulations which provides that "a charge shall be filed in the regional office where the alleged unfair labor practice occurred or is occurring, unless otherwise directed by the General Counsel." The substance of Respondent's argument is that the charge should have been filed in the Salinas Regional Office rather than the Sacramento Regional Office because on December 1, 1976, Alameda County (the county where the alleged unfair labor practice occurred) was assigned to the Salinas Regional Office.

The evidence established that the discharge of Jorge Valenzuela occurred on June 1, 1976. A copy of the unfair labor

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[1/] §1160.2 of the ALRA states "... No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

practice charge was served on the Respondent on November 30, 1976, and it was filed at the Sacramento Regional Office on December 1, 1976. The charge was filed on the last day of the six month limitation period referred to in Section 1160.2 of the Act. That day was the first day the regional offices reopened after a prolonged and uncertain period during which the ALRB offices had been closed because of lack of funds. Prior to the closing of the ALRB offices, Alameda County had been assigned to the Sacramento Regional Office. On December 1, 1976, the day of the offices' reopening, Alameda County was assigned to the Salinas Regional Office. Subsequently, Alameda County was shifted back to the Sacramento Regional Office. When the charge was filed in the Sacramento Regional Office by the UFW on December 1, 1976, Jayne Perez, the Sacramento Region Docket Clerk, was directed by Mike Vargas, the Sacramento Supervising Board Agent, to accept, file, and eventually transfer the charge to the appropriate region. On that day there was some confusion in the Sacramento Regional Office as to the appropriate region for Alameda County.

Respondent was given timely notice of the charge, and was given the opportunity to present any and all evidence and/or argument as to how the filing in the Sacramento Regional Office rather than in the Salinas Regional Office prejudiced its position. Respondent presented no evidence or arguments in that regard. Respondent counsel assures us that he "raised this issue at the hearing in good faith and out of an abundance of caution."

I conclude that Respondent's affirmative defense is without merit and that the complaint based on Charge No. 76-CE-46-M was properly issued within the meaning of Section 1160.2 of the Act by virtue of that charge having been filed in the Sacramento Regional Office within six months of the alleged unfair labor practice. Section 20208 of the Board's Regulations is in the nature of a venue rule and does not purport to regulate the jurisdiction of the Board. The Regulations give the General Counsel discretion with respect to determining where a charge should be filed. The General Counsel exercised that discretion in accepting, filing, and eventually transferring this charge to the appropriate region. [2/] Since Respondent had timely notice of the charge and its substantial rights were not affected by the filing of the charge in the Sacramento Regional Office rather than in the Salinas Regional Office, Respondent is entitled to no relief under its technical affirmative defense.[3/]

2/ Regulation Section 20110 defines the term "general counsel" in terms of Labor Code Section 1149 which provides that "... The General Counsel shall . . . appoint . . . administrative assistants and other employees as necessary for the proper exercise of his duties . . . [and] shall exercise general supervision over . . . the officers and employees in the regional offices . . . ."

3/ Even if the filing in Sacramento were construed to be a technical defect, the NLRB has held that a mere technical defect, such as service of the charge by the use of ordinary mail rather than registered mail, was harmless, for it did not affect the substantial rights of the employer and should be disregarded. 0lin Industries, Inc. v. NLRB (CA 5, 1951) 192 F2d 799, denying rehearing of 28 LRRM 2474, 29 LRRM 2117.

III. The Discriminatory Discharges of Valenzuela and Almazan

American Garden Perry's Plants, Inc. (hereafter "Perry's Plants") produces and sells varieties of annual and perennial bedding plants, ground cover plants, and various trees and shrubs. The Employee Manual (Exhibit GC-9) contains a brief history of the company and sets forth its rules, regulations, and employee benefits. Branch Manager Ron Stacy produced Exhibit R-5 during the course of his testimony, which sets forth the company's organizational structure or "work flow chart." Ron Stacy, Steve Glover, Mike Proffitt, Locke Jorgenson, and Rudy Torrovillas are supervisors within the meaning of Section 1140.4 (j) of the Act. Perry's Plants also utilizes crew leaders or "lead persons" in various crews.

Jorge Valenzuela was hired at Perry's Plants' Fremont Branch in the summer of 1975 by Assistant Production Manager Mike Proffitt. Valenzuela was initially assigned to the stock field. Proffitt told Valenzuela that there were "always three or four working there," thus giving Valenzuela the impression that the job with Perry's Plants was permanent. Valenzuela worked in the stock field for approximately four or five months, during which time there were no complaints regarding his productivity. In fact, according to Valenzuela's testimony, Mike Proffitt complimented him on the job he was doing in the stock field, saying that things were going "real nice," and that the planting was being done ahead of the scheduled completion of the new stock field at the nursery.

In approximately November, 1975, Production Manager Steve Glover transferred Valenzuela to the watering crew, after having asked Valenzuela if he would "like to" do watering 'and after Valenzuela responded that he "didn't know," and that he had "never done it." Valenzuela worked on the watering crew for approximately one and a half months. Glover and other Respondent witnesses testified that during that time Valenzuela's performance as an irrigator was not satisfactory. They testified that, on occasion, they observed "dry spots" that had to be watered by others. Glover testified that a worker in the watering crew would characteristically go through a training period during the first month. Testimony regarding Valenzuela's propensity to leave dry spots related to Valenzuela[1]s first weeks on the job. Valenzuela explained that he didn't have enough time to do the watering properly because his immediate supervisor, Rudy Torrovillas, frequently took him from his watering duties to do other jobs, such as unloading trucks. Valenzuela complained about this to Torrovillas and Glover, and on at least one occasion Valenzuela, along with fellow waterer Philberto went to Glover specifically to complain about Torrovillas' propensity to take them away to do other jobs, making it difficult for them to irrigate properly.

Sometime in December, 1976, Valenzuela told Glover "I seem to be having a little difficulty with the watering," and requested a transfer, whereupon he was transferred to the soil room where he worked for two or three weeks. During this period,

however, he would periodically be assigned to do stock field work. Valenzuela and fellow soil room worker Peter Olmos testified that there were no complaints about Valenzuela's work in the soil room; however, Glover testified that he was not satisfied with Valenzuela's work in the soil room because he had heard from Pete Olmos that Valenzuela was slow and was holding things up. Valenzuela testified that while working in the soil room he had complained about how dusty it was. Glover testified that a need arose for more employees in another department, and therefore Glover transferred Valenzuela to the moving crew where he remained until his discharge on June 1, 1976.

In January, 1976, the UFW began organizational activities at Respondent's Fremont Branch. Sister Juliana DeWolfe led the campaign. Respondent's supervisors accompanied her each time she went onto Respondent's property to talk to the workers. She testified that Valenzuela was the most active employee supporter of the UFW. He assisted her in her organizational efforts by passing out leaflets in the parking lot which was located in front of the company office; he talked to workers at break time and lunch time about the union; he signed a UFW authorization card; he attended union meetings; he was a member of the organizing committee; he arranged with the company for the men to get off a half hour early to attend a union meeting. When Valenzuela reported to her that Glover had agreed to let the men off early for the union meeting, Proffitt was present and heard the conversation. On the day of the pre-election conference, Glover asked Sister DeWolfe, "Where is your friend, Jorge?"

On January 21, 1976, a petition for certification was filed by Sister Juliana. She introduced herself to Branch Manager Ron Stacy when she served him with the petition. The representation election was held on January 28, and the UFW won. On February 6, 1976, the regional offices of the ALRB were closed due to the exhaustion of funds. Although the UFW had won the election, no certification had yet been issued. At about the time the regional offices were closed, Valenzuela was elected President of the Ranch or Negotiating Committee.

On June 1, 1976, Valenzuela was told that he was "laid-off." He was not informed that he was, in fact, "discharged" until he was later given a termination notice (see Exhibit GC-3) wherein Glover marked the notice so as to indicate that Valenzuela was not "available for rehire" due to "marginal productivity— consistently dropped flats instead of laying flats down when transferring flats from one area to another." (Valenzuela had no prior warning regarding his possible discharge for "marginal productivity.") Glover also indicated on the notice that Valenzuela was "laid-off" because of "lack of work" and "employee worked on moving crew. Entire crew was laid off. Employee had worked in other areas and was dissatisfied. For these reasons employee was not transferred to a new working assignment." (Actually, the entire crew had not been laid off. It was proved at the hearing that crew member Raul Ramirez was transferred to the other moving crew.)

Glover testified that although he had checked the box labeled "laid-off" instead of the box labeled "discharged," the intent of the termination notice was to discharge Valenzuela. Respondent admitted the "discharge," and therefore there is no issue in that regard. Glover explained that he chose to fill out the termination notice the way he did so as to minimize the

potential adverse effect on Valenzuela's ability to obtain other employment. The evidence established that Respondent was in the process of diminishing its work force on a seasonal basis at the time Valenzuela was terminated; however, there was no evidence that other "laid-off" workers were similarly unavailable for rehire.

I find that although Respondent presented some evidence that Valenzuela's work in the moving crew was unsatisfactory, taken as a whole, that evidence did not justify Valenzuela's discharge under the circumstances presented in this case. Valenzuela was put in charge of the three-person moving crew because of his ability to read English. It was his responsibility to direct delivery of the plants to designated areas by reading the labels. There was some vague testimony that Valenzuela tended to drop more than his fair share of flats and that Glover admonished him on one occasion to be careful to set the flats down rather than to drop them. Respondent witnesses testified that dropping the flats damaged the arrangement and condition of the plants contained therein, and that all workers, including supervisorial personnel, occasionally dropped flats instead of setting them down.

Even if Valenzuela's performance in the moving crew justified his not being eligible for rehire in that capacity, Respondent's refusal to consider Valenzuela available for rehire was not justified in light of Valenzuela's commendable performance in the stock field and the fact that there were workers with

less seniority still working in the stock field when Valenzuela was discharged. At the very least, Valenzuela should have been available for rehire in the stock field. Instead, he was treated differently from the others who were "laid-off" at the same time *as* being not "available for rehire." This appears to have been because of his participation in protected activities.

Respondent argues that the evidence does not establish that Respondent had knowledge of Valenzuela's purported union activities. I disagree. Sister DeWolfe testified that she saw Proffitt and Stacy by the office door at a time when she and Valenzuela were passing out union leaflets in the parking lot near the office. She testified that she would frequently speak to Valenzuela in the parking lot in front of the office in full view of the supervisors. As indicated earlier, Valenzuela had obtained permission from Production Manager Glover for the men to leave work a half hour early to attend a union meeting, and Assistant Production Manager Proffitt was made privy to that information. Shortly before the pre-election conference, Proffitt asked organizer DeWolfe where her friend was, referring to Valenzuela. Additionally, there was testimony that prior to the election, the company engaged in a no-union campaign and that there were supervisorial meetings conducted by an anti-union specialist by the name of Larabee, during the course of which the supervisors were instructed that one criterion to be used in determining whether an employee was pro-union was whether he was outspoken during company meetings. Glover testified that Valenzuela

was outspoken. Glover also testified that many of the employees would tell him who supported the union, and that Valenzuela was designated as a union supporter. In *fact,* Glover admitted saying to Valenzuela on one occasion, "How's Uncle Caesar?" Valenzuela testified that at one company meeting, he complained *of* unsatisfactory working conditions relating to the hazard presented by the company's failure to clearly distinguish the potable water faucets from the chemical water faucets. There was also testimony that Valenzuela frequently asked questions about the benefits provided by the company, and how they compared with union benefits. There was testimony that after Valenzuela was elected President of the Ranch Committee, supervisor Torrovillas would comment, "How is the President? How is Chavez?" Valenzuela testified that this continuous reference to his position on the Ranch Committee continued until he was discharged on June 1, 1976. Production Manager Glover testified that he was the one who made the decision to discharge Valenzuela. Glover further testified that his adamant anti-union philosophy was well known at Perry's Plants.

John Almazon began working at Perry's Plants in June or July, 1975 in the stock field. After several weeks, he was offered the job of truck driver which he accepted and performed for five or six months, after which he requested a transfer. He then worked for a brief period assembling or helping in the moving crew. Around December, 1975 Glover assigned Almazon to operate a fork lift, which he did for over two years until his

discharge on January 23, 1978.

Almazon's termination notice states that he was discharged because there was "No notification of absence after 1 wk. (1/9/78)" (see Exhibit R-12). The evidence presented at this hearing established that Almazon became sick on December 31, 1977 with a flu type affliction. He was unable to report to work on January 3rd (the first day of work following the New Year holiday) because of his illness, and Respondent received notice of that fact from Almazon's wife on that day, as well as a note from a medical doctor to the effect that John Almazon would not be able to report to work before January 9th because of his illness. On or about January 9, Almazon was still sick. He made another appointment with the doctor. Proffitt telephoned the doctor's office on January 10th and learned that Almazon was still on medication and that he had some type of pneumonia. On January 13th, Mrs. Almazon informed Respondent's secretary that her husband was still ill. On that same day, Proffitt remarked to another worker that Almazon was absent because he had pneumonia. On January 20th, Mrs. Almazon told Proffitt that her husband was still sick. Proffitt told her to tell John to take care of himself and to bring a note from the doctor when he returned to work. Almazon reported to work on the morning of January 23rd with a doctor's excuse regarding his absence. His time card was not in its usual place. He made inquiry and ultimately learned from Proffitt that he had been discharged because he hadn't notified them regarding his absence after January 9th. Almazon

gave the doctor's letter to Proffitt, whereupon Proffitt offered Almazon the opportunity to fill out a new application for work in some capacity other than fork lift operator or to cut ivy and sell it to the Respondent as an independent contractor.[4/]

Respondent admits that it discharged Alinazon on or about January 23, 1978; therefore, it is not necessary to belabor the question of whether the offers to buy ivy from Almazon or to have him fill out a new application for a job other than fork lift operator negate the discharge and/or are elements of a constructive discharge. The issue in this instance is whether Respondent had knowledge of Almazon's pro-union activities and, if so, whether the discharge was justified within the meaning of the relevant law.

Respondent argues that the evidence does not establish that it had knowledge that Almazon supported the union or engaged in pro-union activities. I disagree. The preponderance of the evidence presented at this hearing established that Almazon had been selected by the UFW to be a member of the Negotiating Committee as early as December 13, 1977, and that his supervisor

4/ Respondent's Employee Manual (Exhibit GC-9) makes frequent reference to "continuous service" with respect to employee benefits. Almazon testified that he assumed he would lose his seniority rights and other continuous service benefits if he filled out a new application for some other work. He did not specifically ask Proffitt if that were true, and Proffitt did not advise him that he would be anything other than a new employee. In fact, Proffitt admitted that he loaded the options in favor of cutting ivy so as to persuade Almazon to accept that choice.

Mike Proffitt knew it. Almazon spoke to other employees about the union, attended and encouraged other employees to attend union meetings, and passed out union leaflets in the parking lot near the Respondent's office. On December 13, 1977, UFW organizer Ken Fugimoto asked Production Manager Proffitt (he had succeeded Glover) if he could talk to John Almazon and several other workers about attending a negotiation meeting. Proffitt gathered the workers and explained to them that he would be disappointed if they left their jobs to attend a Negotiation Committee meeting of which he had no prior notice, and that their absence would cost the company substantial sums of money. The workers were dissuaded from participating in the bargaining session; however, later that same day Proffitt asked Almazon whether or not Almazon had seriously intended to attend the negotiation meeting. Almazon testified that he told Proffitt that he had intended to go, but he did not want to be the only one, and therefore had returned to his job. Almazon frequently walked with organizer Fugimoto when he came onto Respondent's property. A Respondent supervisor usually escorted Fugimoto whenever he entered Respondent's property. On December 23, 1977, Almazon attended a meeting during work time, on company property, called and conducted by Doris Jorgenson wherein she advocated a no-union position. The majority of the workers attended the meeting, including supervisor Torrovillas. At the end of the meeting, Almazon suggested to the workers present that they all go to the next UFW meeting to get the facts for themselves.

Almazon informed the employees of the next UFW meeting which was scheduled for December 29, 1977. On December 29, 1977, after work, a car caravan, including John Almazon and his wife, followed UFW organizer Fugimoto from Respondent's nursery to the union meeting place. Doris Jorgenson was one of those who attended the meeting that evening. After the meeting, she asked Almazon what he thought about the union position, and Almazon responded that he favored the UFW. The following day, December 30, 1977, was Almazon's last working day for Respondent.

In December of 1977, Doris Jorgenson was the "Supervisor of Production and Repair of Pots and Flats" (see Respondent Exhibit R-10). She was married to supervisor Locke Jorgenson. Respondent's total nonmanagerial work force at its Fremont nursery is between 50 and 100 workers, depending upon the seasonal needs. All of the above mitigates against Respondent's contention that it had no knowledge that Almazon supported the union or engaged in pro-union activities at the time he was discharged on January 23, 1978.

Regarding Respondent's preferred reasons for Almazon's discharge, I find that the reason set forth in the termination notice (Exhibit R-12), i.e., "No notification of absence after 1 wk. (1/9/78)," was not justified by the evidence. I find that Respondent did have sufficient knowledge of Almazon's medical incapacity, and that Proffitt's "reason for termination" was a pretext within the meaning of the applicable labor law discussed below, and, moreover, was contrary to the policies set forth in Respondent's Employee Manual. That manual provides that with respect to sick leave, a doctor's certificate of disability shall be required every 30 days to establish qualification for sick

leave, and that an employee returning from a leave of absence of less than 30 days will be returned to his former job (see Exhibit GC-9, page 7). There was evidence that Almazon had been absent from work for extended periods due to injury or illness prior to the absence which culminated in his termination. In each of those previous instances, he was returned to his former job by Respondent. These previous sick leave absences were before he became involved in the UFVJ organizational activities commencing in December of 1977. It should be noted that the evidence established that after the UFW won the election on January 28, 1976, it did not resume organizational activities at Respondent's nursery until December of 1977.

At this hearing, Respondent offered an additional reason for Almazon's termination, i.e., marginal or erratic work performance. Respondent sought to establish that Almazon had a history of tardiness and that he tended to talk to the women too much to the detriment of his fork lift operator duties. Suffice it to say that this preferred evidence was vague, inconsistent, and questionable at best. In any event, it is different from the reason for termination given at the time of the discharge, and in some respects appears to be an afterthought thereto. For example, Production Manager Mike Proffitt testified that he personally wrote Exhibit GC-12 which appears to be a reprimand for a "work slow-down" caused by Almazon. It is dated "Sept. 28, "77;" however there are impressions on that sheet of paper which indicate that it could have been written on or after February 2, 1978, which is two weeks after Almazon was terminated and Respondent had been served with the unfair labor practice complaint, and two

weeks before the originally scheduled hearing date of February 15, 1978. The impressions appear to be the result of Proffitt's having written on a sheet of paper directly on top of the Almazon reprimand. The impressions are of words written in straight lines corresponding to the printed lines on the tablet sheets. They relate to a person named Valdez whose check was lost on "2/2/78." Proffitt was confronted with the impressions and their significance by UFW counsel at the hearing. Proffitt testified that the impressions appeared to be his writing, but he could offer no explanation as to how they got on the Almazon reprimand. UFW counsel contends that the impressions relating to the 2/2/78 incident appear on the Almazon reprimand dated September 28, 1977 because Proffitt wrote both documents on sheets of paper from the same tablet and that he wrote about the 2/2/78 incident before he wrote the Almazon reprimand, thus indicating "that Respondent has manufactured evidence for use at the hearing."

Almazon testified credibly that he never received any written reprimands or complaints regarding his work except for one small slip of paper upon which was written in English something to the effect that he had missed work on a certain Monday and had failed to report to the company. Proffitt did not testify that he had ever presented the "Sept. 28, "77" reprimand to Almazon; however, he did testify that he presented Exhibit R-3 (final warning for overabundance of tardiness) to Almazon. Again, Proffitt's credibility is weakened by the fact that R-3 is not dated, nor does it in any way refer to an identifiable period of time during Almazon's two and one-half year tenure with Perry's Plants.

Additional evidence relating to Proffitt's questionable credibility involves Exhibits R-6 and R-10. Proffitt testified that these were original documents (job descriptions), he had prepared, copies of which he personally handed to Respondent employees Doris Jorgenson and Betty Cason; however, Respondent's own witness, Doris Jorgenson, testified that General Counsel's Exhibits GC-10 and GC-11 were true copies of the documents she and Betty Cason received from Proffitt, and not R-6 and R-10. Again, when confronted, Proffitt could offer no explanation.

Additional evidence undermining Proffitt'-s credibility is Respondent's Exhibit R-12, Almazon's Termination Notice. Proffitt testified that although he didn't tell Almazon that he was fired until January 23rd, he had actually fired him on 1/17/78 as set forth in the notice he allegedly prepared on January 17th. He testified that as a result of a conversation he had with Almazon's wife on January 20th, he wrote on the notice that Almazon would be available for rehire if "he could show an excused absence from his Dr & be willing to change job duties." Again, he failed to explain how his writing on the 17th was influenced by a conversation which did not take place until the 20th. He also testified that he didn't tell Mrs. Almazon he had already fired her husband (as of the 17th) during, his conversation with her on the 20th, but had merely told her to tell her husband to take care of himself and to bring a doctor's excuse when he returned to work.

I find that the evidence preponderates in favor of General Counsel and Charging Party's contention that John Almazon was discharged because of his pro-union activity and against

Respondent's contention that his discharge was justified because of his alleged unnotified absence and/or unsatisfactory work performance.

The law relevant to Valenzuela and Almazon's discharges is set forth in Section 1153 of the ALRA, which states:

> "It shall be an unfair labor practice for an agricultural employer to do any of the following:
>
> (a) To interfere with, restrain, or coerce agricultural employees in the exercise of their rights guaranteed in Section 1152. . . .
>
> (c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization."

Section 1152 of the ALRA provides that:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in Subdivision (c) of Section 1153.

ALRA Section 1148 directs the Board to follow applicable precedents of the National Labor Relations Act, as amended. Sections 1153 (a) and (c) are essentially identical to Sections 8(a)(l) and (3) of the National Labor Relations Act, and Section 1152 of the ALRA corresponds to Section 7 of the National Labor Relations Act.

The ALRB has held that an employer who discharges a worker because of his union activities violates Section 1153 (c) and, derivatively, Section 1153 (a). See, e.g., Arnaudo Bros., Inc.

(1977) 3 ALRB No. 78; Maggio-Tostado, Inc. (1977) 3 ALRB No. 33; Sunnyside Nursery, Inc. (1977) 3 ALRB No. 42, and Hemet Wholesale (1977) 3 ALRB No. 47.

The ALRA §1153 (c) [NLRA §8 (a) (3)] prohibition against discrimination to encourage or discourage union membership includes "discouraging participation in concerted activities." NLRB v. Erie Resistor Corp. (1963) 373 U.S. 221, 233, 53 LRRM 2121. Discharges in retaliation for union activity, therefore, violate Sections 1153 (a) and (c) because they not only discriminate in regard to tenure of employment to discourage union membership, but also interfere with employee rights protected by Section 1152 of the Act.

Although the same employer conduct may constitute a violation of Sections 1153 (a) and (c), the elements required to prove the two violations differ. A finding of an NLRA §8 (a) (1) [ALRA §1153 (a)] violation is made upon a showing that employer conduct would tend to interfere with, restrain or coerce reasonable employees in the exercise of their right to engage in protected, concerted activity. It is an objective standard and requires neither anti-union animus nor the effect of discouraging union membership. NLRB v. Corning Glass Works (CA 1, 1961) 293 F2d 784, 45 LRRM 2759; NLRB v. McCatron (CA 9, 1954) 216 F2d 212, 35 LRRM 2012, cert, den. (1955) 334 U.S. 943, 35 LRRM 2461. Federal Courts of Appeal have declined to find violations of Section 8(a)(3) because the discharges did not discourage union membership, yet enforced NLRB reinstatement and back pay orders

because the discharges were found to constitute illegal interference under Section 8(a)(1) . See, e.g., NLRB v. J.I. Case Co. (8th Cir., 1952) 198 F2d 919, 30 LRRM 2624, cert, den. (1953) 345 U.S. 917, 31 LRRM 2468; Modern Motors v. NLRB (8th Cir., 1952) 198 F2d 925, 30 LRRM 2628.

A finding of a violation of NLRA §8 (a) (3) [ALRA §1153 (c) requires a showing that the employer acted "to encourage or discourage membership in any labor organization" and that this effect is brought about by "discrimination." The United States Supreme Court noted in Radio Officers Union v. NLRB (1954) 847 U.S. 39, 33 LRRM 2417, that although the "relevance of the motivation of the employer . . . has been consistently recognized . . . under 8(a)(3) ... it is also clear that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of 8(a)(3) . . . [R]ecognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct. ..."

Subsequently, the United States Supreme Court held, in NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26, 65 LRRM 2465: "[I]f it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive of important employee rights,' no proof of an anti-union motive is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations."

Where it is necessary to establish unlawful motivation by the employer, the NLRB has continued to accept traditional indicia of discriminatory intent, drawing inferences from circumstantial evidence, as it is generally all that is available to prove "motive" in any type of case. See NLRB v. Putnam Tool Company (6th Cir., 1961) 290 F2d 663, 48 LRRM 2263. For example:

A. Changes in position in respect to explaining the reason for the discharge. Federal Mogul Corp., Sterling Div. v. NLRB (CA 8, 1968) 391 F2d 713, 67 LRRM 2686; NLRB v. Buitoni Foods Corp. (CA 3, 1962) 298 F2d 713, 49 LRRM 2397; J. R. Townsend Lincoln Mercury (1973) 202 NLRB 71, 82 LRRM 1793; Holiday Inn of Hemyetta, (1972) 198 NLRB 410, 80 LRRM 1697, enforced (CA 10, 1973) 4S8 F2d 498, 84 LRRM 2585; Plant City Steel Corp. (1962) 138 NLRB 839, enforced (CA 5, 1964) 331 F2d 511; Harry F. Berggren & Sons, Inc. (1967) 165 NLRB 353, enforced (CA 8, 1969) 406 F2d 239, cert, den. 396 U.S. 823; American Casting Services, Inc. (1965) 151 NLRB No. 23, enforced (CA 7, 1966) 365 F2d 168.

B. Failure to warn the employees prior to discharge. NLRB v. Mid State Sportswear (CA 5, 1969) 412 F2d 537, 71 LRRM 2370; Sathern Furniture Mfg. Co., (CA 5, 1952) 29 LRRM 2392; NLRB v. Lone Star Textiles, Inc. (CA 5, 1967) 386 F2d 535, 67 LRRM 2221; Great Atlantic and Pacific Tea Co. (1974) 210 NLRB 593, 86 LRRM 1444; Independent Gravel Co., Inc., 226 NLRB No. 176, 94 LRRM 1176.

C. Failure to tell the employee the reason for the discharge at the time of the discharge. Forest Park Ambulance

Service (1973) 202 NLRB 550, 84 LRRM 1506; Alamo Express, Inc. (1972) 200 NLRB 178, 82 LRRM 1148, enforced (CA 5, 1974) 85 LRRM 2768.

D. Delay in the discharge after knowledge of an offense. Montgomery Ward & Co. (1972) 197 NLRB 519, 80 LRRM 1778.

In order to establish discriminatory discharge of an employee for engaging in union organizing or other protected concerted activity, it must be shown that the employer had some knowledge that the employee was so engaged. See, e.g., NLRB v. Whitin Machine Works (1st Cir., 1953) 204 F2d 883, 32 LRRM 2201. A supervisor's knowledge of employee activities is routinely imputed to the employer. NLRB v. Alabama Marble Co. (1949) 83 NLRB 1047, 24 LRRM 1179; NLRB v. MacDonald Engineering Co. (1973) 202 NLRB No. 113, 82 LRRM 1646.

Once a prima facie case has been established that an employee was discharged because of his union activities, it becomes incumbent upon respondent, if it would avoid that result, to come forward with a valid explanation for the discharge. Maggio-Tostado, Inc., supra; NLRB v. Miller Redwood Company (1967) 164 NLRB 389, 65 LRRM 1118, enforced (9th Cir. 1969) 407 F2d 1366, 1370, 70 LRRM 2868; NLRB v. Standard Container Co. (1968) 171 NLRB 433, 68 LRRM 1158, enforced (5th Cir., 1970) 428 F2d 793, 794, 74 LRRM 2560; NLRB v. Great Dane Trailers, Inc., supra; Arnaudo Bros., Inc., supra.

The NLRB has frequently rejected respondent's preferred justifications for the discharge, finding a violation of Section 8(a)(3) where otherwise lawful, economically justified discharges are carried out in a discriminatory fashion. See, e.g., Braswell Motor Freight Lines, Inc. (1966) 61 LRRM 1119 (several employees disregarded instructions, but only union members permanently discharged); Olsen Bodies, Inc. (1970) 74 LRRM 1027 (termination of union adherent violated NLRA despite the claim that he "quit" by refusing to accept a job transfer); Clinton Packing Co., Inc. (1971) 77 LRRM 1910 (discharge of union adherents allegedly for leaving work violated the NLRA, where other workers were not).

In addition to the above, other relevant cases dealing with employer defenses claiming either lack of work or poor performance as a justification for the allegedly discriminatory discharge are as follows:

Even credible claims by respondent that discharges occurred because work was not available do not end the inquiry because layoffs that may be warranted under Section 8(a)(3) have been held to violate 8(a)(1) where they were handled in a manner that gave employees the idea that it was no ordinary layoff, but a punishment for union activities. NLRB v. Vacuum Plating Co. (1965) 155 NLRB No. 73, 60 LRRM 1401.

Prior tolerance of conduct identical to that used as a pretext for a discharge which takes place after union activity has begun is a strong indication of the discriminatory nature of

the discharge. NLRB v. Princeton Inn (CA 3, 1970) 424 F2d 264, 73 LRRM 3002; NLRB v. Finesville Mfg. Co. (CA 5, 1968) 400 F2d 644, 69 LRRM 2307; Hackett Precision Co. (1971) 190 NLRB 72, 77 LRRM 1230; John J. Canova & Teamsters Local 137 (1976) 227 NLRB No. 269; Edward G. Budd Mfg. Co. v. NLRB (CA 3, 1943) 138 F2d 86, 13 LRRM 512.

Even where respondent offers a valid complaint as to job performance, a violation may be found where there is a discriminatory intent. In Sunnyside Nurseries, Inc., supra, the ALRB said "Even where a valid reason for a discharge may exist, a discharge nonetheless violates the Act where the moving reason for it relates to union activity." Citing with approval NLRB v. Linda Jo Shoe Co. (CA 5, 1962) 307 F2d 355; see also S. Kuramura, Inc. (1977) 3 ALRB No. 49. In Hugh H. Wilson Corp. v. NLRB (CA 3, 1969) 71 LRRM 2821 at 2831, the Third Circuit Court of Appeals said, "It may be that neither was an ideal or even an acceptable employee, but the policy and protection provided by the NLRA does not allow the employer to substitute 'good reasons' for 'real reasons' when the purpose of the discharge is to retaliate for an employee's concerted activities." See also Advanced Business Forms Corp. (CA 2, 1972) 82 LRRM 2161; Winchester Spinning Co. (CA 4, 1968) 69 LRRM 2458; Edward G. Budd Mfg. Co. v. NLRB, supra.

The degree of proof required to establish that any person has engaged in an unfair labor practice is by a "preponderance of the testimony taken." Calif. Labor Code Section 1160.3.

In the case of S. Kuramura, Inc. (1977) 3 ALRB No. 49, at page 12, the Board provides us with the following guidelines:

> "... Of course, the General Counsel has the burden to prove that the respondent discharged the employee because of his or her union activities or sympathies. It is rarely possible to prove this by direct evidence.
>
> Discriminatory intent when discharging an employee is 'normally supportable only by the circumstances and circumstantial evidence.' Amalgamated Clothing Workers of America, AFL-CIO v. NLRB, 302 F.2d 186, 190 (C.A.D.C. 1962), citing NLRB v. Link-Belt Co., 311 U.S. 584, 597, 602, 61 S. Ct. 358, 85 L.Ed. 368 (1941). The Board may draw reasonable inferences from the established facts in order to ascertain the employer's true motive. Even though there is evidence to support a justifiable ground for the discharge, a violation may nevertheless be found where the union activity is the moving cause behind the discharge or where the employee would not have been fired 'but for[1] her union activities. Even where the anti-union motive is not the dominant motive but may be so small as 'the last straw which breaks the camel's back', a violation has been established. NLRB v. Whitfield Pickle Co. 374 F. 2d 576, 582, 64 LRRM 2656 (5th Cir. 1967).
>
> The NLRB has found discharges to be discriminatory where: The employer gives 'shifting reasons' for the discharge, indicating 'mere pretenses' for an anti-union cause, Federal Mogul Corp., Sterling Aluminum Co. Div. v. NLRB 391 F. 2d 713, 67 LRRM 2686 (8th Cir. 1968); no reason is given at the time of discharge and no warning is given about objectionable behavior, NLRB v. Tepper, 297 F. 2d 280, 49 LRRM 2258 (10th Cir. 1961); there is prior tolerance of conduct which the employer relies on to justify the discharge after union activity has begun, NLRB v. Princeton Inn Co., 424 F.2d 264, 73 LRRM 3002 (3rd Cir.1970);a more experienced worker who has participated in union activities is fired rather than a less experienced worker, Federal Mogul Corp., Sterling Aluminum Co. Div. v. NLRB, supra.

Additional cases dealing with factors similar to those in the case at bar wherein the NLRB has considered circumstantial evidence of a discriminatory discharge are as follows:

J. R. Townsend Lincoln Mercury, supra; Holiday Inn of Hemyetta, supra; Goodyear Tire and Rubber Co. (1972) 197

NLRB 666, 80 LRRM 1701 (changes in position in respect to explaining the reason for the discharge);

Marx-Haas Clothing Co. (1974) 211 NLRB 350, 87 LRRM 1054; Howard Johnson Co. (1974) 209 NLRB 1122, 86 LRRM 1148; D. M. Rotary Press, Inc. (1974) 208 NLRB 366, 85 LRRM 1477, enforced (CA 6, 1975) 524 F2d 1342, 91 LRRM 2240; Uniroyal, Inc. (1972) 197 NLRB 1034, 80 LRRM 1694; Atlantic Marine (1971) 193 NLRB 1003, 78 LRRM 1460; Shivvers Corp. (1974) 213 NLRB No. 15, 87 LRRM 1753 (the timing of the discharge, e.g., shortly after employer gains knowledge of union activity).

Lastly, the Board gives us additional guidance with respect to dealing with the facts in our case (especially as to Valenzuela and some of Respondent's evidence that he performed his work slowly) in the recent case of Bacchus Farms (April 28, 1978) 4 ALRB No. 26, at page 5, when it held:

> "We conclude that his discharge was motivated in substantial part[1/] in reprisal for his protected activities. In these circumstances, even if the employee's slow work performance was a contributing factor in the decision to discharge him, his termination nonetheless constitutes a violation of Section 1153 (c) and (a) of the Act. NLRB v. King Louie Bowling Corp., 472 F.2d 1192 (8th Cir. 1973), 82 LRRM 2576; Sinclair Glass Company v. NLRB, 465 F.2d 209 (7th Cir. 1972), 80 LRRM 3082.

[1/] The ALO noted that Nava, Jr., admitted that one of the reasons he was transferred from job to job was because he was slow, seemingly ignoring the fact that this was only one of the reasons Nava advanced, the other being his conversations with Supervisor Gustavo Leon about the Union. Moreover, his response to the question as to why he had been transferred does not go to the issue of the reason he had been discharged, which Nava, Jr., testified he believed was because Reinoso had seen him distributing the leaflets."

Application of the law cited above to the facts in our case supports my findings that Valenzuela and Almazon were discharged because of their participation in protected activities

The evidence clearly established that Respondent was opposed to the UFW. It conducted an extensive no-union campaign before the election and continued with its efforts to discourage its employees' involvement with the union after the election. There were management meetings for supervisorial guidance in waging the no-union campaign and meetings wherein management endeavored to explain to the workers the disadvantages of bringing in the union compared to the benefits to be realized if the company won, such as continued employment and raises. Respondent supervisors (at least Glover and Proffitt), utilizing large "flip-up" placards printed in Spanish and English, told groups of employees that they could lose their jobs if they voted for the union,— and that there could be loss of future employment should the people vote for the union.

Supervisorial personnel accompanied union representatives when they were on company property, thereby inhibiting the workers' contact and dialogue with the UFW representatives. Respondent supervisorial personnel sought to ascertain who was pro-union and who was not. Almazon credibly testified that dispatcher (an admitted supervisorial post) Luis Sierra interrogated the employees regarding how they voted in the election.

—The ALRB has held that such threats are a violation of §1153(a] of the Act and an indication of anti-union animus. See McCoy's Poultry Services, Inc., 4 ALRB 15.

Glover, Proffitt, Torrovillas, and Doris Jorgenson not only expressed their strong anti-union animus but also made inquiry of and comments to workers regarding their union sympathies.

As discussed more fully in the succeeding section of this Decision, Doris Jorgenson (a person whose conduct is imputable to Respondent) conducted a meeting of the workers on company time and on company property to marshal their support of her effort to get rid of the union. She had called the meeting by public announcement over the company loud speaker system, after first having obtained the permission of Branch Manager Stacy. Immediately after the meeting, she drafted an anti-union petition at the Production Manager's desk, using company paper, and then approached individual workers seeking their signatures on the petition.

All of the above supports General Counsel and Charging Party's contention that Respondent manifested an anti-union animus, and *I* so find. General Counsel and UFW also contend that Respondent has been effectuating a realization of its previous warnings that there could be future loss of employment should the people vote for the union, in that the majority of the employees who voted in the election have already been eliminated from the payroll (see Exhibit GC-4), including the two most visible union supporters, Valenzuela and Almazon; and that this purge of union supporters is well known to Respondent's workers. Although I find in favor of their contention with respect to Valenzuela and Almazon, there was insufficient evidence to determine whether the other terminations were part of the purge or simply the result of normal attrition.

I conclude, in accordance with my findings discussed earlier and in light of the relevant law set forth above, that Respondent discharged Jorge Valenzuela and John Almazon because of their participation in concerted activities in violation of Sections 1153 (a) and (c) of the ALRA.

Respondent knew that these two employees were activists in the union/no-union struggle at Perry's Plants and that at the time of their respective discharges they were definitely in the union camp. Respondent's preferred justifications for the discharges are not supported by the evidence and/or the decisional law chronicled above.

IV. The Surveillance and Interrogation by Doris Jorgenson

Doris Jorgenson began working for Perry's Plants in February or March of 1976. She became a crew leader in March of 1976 under the supervision of the Production Manager. During the latter part of November or the first part of December, 1977, she was given the title and duties of a Supervisor of Production and Repair of Pots and Flats (see GC-8). Exhibit GC-8 was personally handed to her by Mike Proffitt at a meeting attended by Doris Jorgenson, Betty Cason, Ascencion Gallo, and Locke Jorgenson, Each of those individuals also received a job description from Mike Proffitt at that meeting. Ms. Jorgenson testified that she has always been and continues to be a nonsalaried hourly employee who punches the time clock; however, she also testified that she receives $3.25 per hour while the other women working in her repair crew receive the hire-in wage of $3.00 per hour or

slightly higher at $3.10 per hour. She explained that she has been with the company longer than the other women in her repair crew. Steve Glover testified that some of Perry's ''supervisors" were hourly employees. Respondent points out in its brief that Mr. Glover's testimony should not be afforded undue weight with respect to his having labeled Doris Jorgenson a "supervisor" because, "throughout the hearing it was apparent that the company often used this word in a broad and non-technical sense to include lead persons as well as §1140.4(j) supervisors."

The evidence established that Doris Jorgenson worked with and supervised approximately six to eight women in her crew (this is consistent with her job description as set forth in Exhibit GC-8, which includes, "5. Work with and supervise these personnel."). The evidence also established that her work is accomplished pursuant to a daily list provided to her by the Production Manager, wherein he indicates the identity of the plants to be repaired. When several priorities are listed, she independently decides which job should be done first, and by whom. She directs the employees in the manner in which they perform the work. If there are any mistakes in repairing the plants, she corrects the work or directs it to be corrected. She testified that approximately 90 percent of the time she does the same work as the other women; however, additionally, she directs and teaches the others how to do the repair work and occasionally, the planting. She would report to the Production Manager which girls in her crew were capable of planting, and these girls were

usually transferred to a higher paying job in the planting crew. Ron Stacy testified that Doris kept production records for her crew. John Almazon testified that he saw Doris reprimand two Filipino girls working in her crew who were not doing the work correctly.

Branch Manager Ron Stacy, Production Manager Mike Proffitt, and Doris Jorgenson all testified consistently that the job description set forth in Exhibit GC-8 accurately described Doris' duties and the work she actually performed. Those duties include establishing labor and material requirements, instructing new planters, supervising pot set up, directing assembly of material, supervising personnel, responsibility for pot maintenance, and the reporting of daily needs for area cleanup.

There was testimony that other employees considered Doris a supervisor. John Almazon testified that he was reluctant to give Doris information she requested regarding his and his co-workers' attitude toward the union. There was also testimony that she was ousted from a union meeting which was held sometime after a January 17, 1978, negotiation session at which Respondent labeled Doris a "supervisor" and took the position that Doris and two other "lead persons" (Gallo and Soria) should be excluded from the bargaining unit (see Exhibit R-8).

John Almazon testified that Doris told him that if Betty Cason didn't "clean up her act she wouldn't be around much longer" (Doris admitted that she may have said that unless Betty

"got her act together" she might lose her job). Within a few weeks, Betty Cason was fired.

On December 23, 1977, Doris called a meeting of all of Perry's Plants' employees, after first checking with Branch Manager Stacy and obtaining his consent, by using the company intercom loud speaker system to announce the meeting to the employees. She conducted the meeting in one of the company's greenhouses. The employees spent approximately 45 minutes at the meeting, during which time Doris expounded her anti-union views and urged the workers to take a similar position. The Respondent paid the workers their regular rate of pay during the time they spent at the meeting. Supervisor Rudy Torrovillas attended the meeting, along with a majority of the workers. (Production Manager Proffitt later instructed Cason to amend her Daily Planting Record [see GC-5] because she had written "3/4 hr. union meeting" so as to delete the word "union.") Immediately after the meeting, Doris spent one or two hours endeavoring to further her goal of ousting the union from Perry's Plants. She drafted a petition to that effect at Production Manager Proffitt's desk, using company paper. She walked around Perry's Plants' premises, endeavoring to obtain signatures from the employees on the petition. The evidence established that no other "employees" had ever called a meeting involving all of the employees at Perry's Plants by using the intercom loud speaker system. In fact, the testimony was that only supervisorial and/or secretarial personnel ever used the intercom loud speaker system. Additionally,

there was no evidence that any other "employee" had ever called and/or conducted a general company meeting to discuss union matters on company property during regular working hours.

In addition to having called and conducted the meeting, and having drafted and circulated the anti-union petition (during which she personally sought to obtain signatures from Perry's Plants' employees), the testimony established that Doris frequently asked John Almazon how he felt about the union and if other employees were attending union meetings and who they were. Doris attended union meetings with Respondent employees on December 22 and 29, 1977, during which she asked many pointed questions about the union. After the meeting of the 29th, she again asked Almazon how he felt about the union. He responded unequivocably in favor of the union, and was discharged several weeks later.

Doris attended another union meeting subsequent to the negotiating session in January of 1978 (this was the session wherein the Respondent had labelled her a "supervisor" and sought to exclude her from the bargaining unit); however as previously indicated, she was ousted from that meeting by the others in attendance because they considered her to be a supervisor.

Respondent, in its brief, concedes "that if Doris Jorgenson had been a company supervisor or agent at the time, her actions in circulating an anti-union petition and speaking with John Almazon about the union would constitute unlawful interrogation and/or surveillance." Although having previously "loosely" labelled her a "supervisor," Respondent "strongly denies that Ms.

Jorgenson was *a.* supervisor within the meaning of Section 1140.4 (j) of the Act or was acting as a company agent at the time." General Counsel and Charging Party contend that Ms. Jorgenson was a supervisor (both in name and function) within the meaning of the Act and/or the Respondent's agent at the time she conducted the meeting on December 23, 1977, circulated the petition, questioned John Almazon regarding union views and activities, and attended the union meetings on December 22 and December 29 of 1977, and, that, in accordance therewith, Respondent violated Section 1153(a) of the Act.

The law relevant to the issue of Ms. Jorgenson[1]s status is as follows:

Section 1140.4 (j) of the ALRA provides that:

> "The term 'supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 2(11) of the NLRA defines supervisor in essentially identical language. In connection with this definition, two principles are well settled. The first is that it "is to be interpreted in the disjunctive . . . and the possession of any one of the authorities listed in Section 2(11) places the employee invested with this authority in the supervisory class." Ohio Power Co. v. NLRB (CA 6) 176 F2d 385, 387, cert, den. 338 U.S. 899. The second is that Section 2(11) "does not require the

exercise of the power described for all or any definite part of the employee's time. It is the existence of the power which determines the classification." Ohio Power Co. v. NLRB, supra, at 388.

The fact that one supervisor in charge of one part of the production works under other supervisors, is bound by carefully formulated rules, and must receive approval of superiors before acting does not preclude supervisorial status. NLRB v. Budd Mfg. Co. (6th Cir., 1948) 169 F2d 571, 22 LRRM 2414. The possession of authority to use independent judgment in one of the specified authorities is enough. NLRB v. Brown and Sharpe Mfg. Co. (1948) 169 F2d 331, 334, 22 LRRM 2363. A higher rate of pay, director of other employees' efforts, reporting employees who do not do good work, and possession of greater skill than other employees are factors which support a finding of supervisorial status. Con-Plex Division of U.S. Industries (1972) 200 NLRB 466, 468, 81 LRRM 1548 (1972). One who instructed other employees, who told employees to redo work which was done wrong, who was considered to be a supervisor, and who issued warnings, was found to be a supervisor. Paoli Chair Co. (1974) 213 NLRB 909, 920, 87 LRRM 1363.

The exercise, or the authority to exercise, any of the statutory functions may classify one as a supervisory person even if most of his time is spent in normal production or maintenance duties. NLRB v. Brown and Sharpe Mfg. Co., supra. The exercise of one or more of the statutorily defined

functions is always the focal point for assessing supervisorial status, but the NLRB continues to consider "secondary indicia" in borderline cases. Among the secondary indicia relevant to our case are:

Whether the individual is considered by fellow workers to be a supervisor. Gerbes Supermarket, Inc. (1974) 213 NLRB No. 112, 87 LRRM 1762.

Where the individual attends management meetings. Typographers Local No. 101 (Washington Post Co.) (1975) 220 NLRB No. 144, 90 LRRM 1523.

Where a working foreman required to use discretion in directing work of linemen was a supervisor. He worked alongside the men. Douglas Elec. Corp. (1972) 194 NLRB 821, 79 LRRM 1118.

Where a shop foreman with supervisory authority was a supervisor even though working with tools 40 percent of his time, despite a contract provision which defined supervisory employees as persons who do not work with tools of the trade. Pattern Makers Ass'n. (1972) 199 NLRB 96, 81 LRRM 1177.

Holding that the authority to transfer employees constitutes the exercise of independent judgment even though the authority to hire and fire may be absent. NLRB v. Big Ben Department Stores (CA 2, 1968) 396 F2d 78.

Relevant factors in determining supervisorial status include relative earnings, the power to transfer, hire, discharge, assign and direct work, the authority to excuse absences, validate time cards, and report to management regarding the quality of production. Dairy Fresh Products, 3 ALRB No. 70.

Respondent argues that "the 'crew leader[1] system was fully in effect at Perry's, as it is in many agricultural operations, and was not generated simply to bolster the company's position with respect to Doris Jorgenson." Respondent points out that Mr. Stacy testified that Perry's had numerous other crew leaders besides Ms. Jorgenson and Ms. Cason—"at least six other persons who should be included in that category, including George Valenzuela." Respondent's argument is unconvincing when considered in light of the January 17, 1978 negotiation session at which Respondent's representatives (Branch Manager Ron Stacy, attorney Fred Morgan, and Main Negotiator Mark Ferring) presented a "List of Excluded Employees" from the bargaining unit (see Exhibit R-8). The list specified three "Lead Persons" whom Respondent representatives labelled supervisors—Doris Jorgenson, J. A. Gallo, and Octabiano Soria. It is significant that these three lead persons were distinguished from the other lead persons and, in fact, were labelled "supervisors" by the Respondent at that meeting. When questioned at our hearing, Stacy asserted that the term "supervisor" was used loosely and that the company considered these three lead persons to be neither agricultural employees nor management. In response, General Counsel makes the telling point that "These three individuals, however, were also not considered clerical or confidential employees and therefore can only be supervisors."

I find, when weighing the credible evidence presented in this case, as set forth earlier herein, and applying the above

relevant law, that General Counsel and Charging Party have proved that Doris Jorgenson was Respondent's supervisor at the time she called and conducted the meeting on December 23, 1977, circulated the anti-union petition, questioned Almazon about his and fellow workers' union views, and attended the union meetings in December of 1977.

At the very least, Ms. Jorgenson was Respondent's agent on December 23, 1977, and her conduct was imputable to Respondent (whose management had timely knowledge of the events or grounds for knowledge) within the meaning of the language of the cases cited below.

The acts of nonsupervisory employees are imputed to the employer "if there is a connection between management and the employee's action, either by way of instigation, direction, approval, or at the very least acquiescence. ..." NLRB v. Dayton Motels, Inc. (6th Cir., 1973) 474 F2d 328, 82 LRRM 2651, enforced (1971) 192 NLRB No. 112, 78 LRRM 1069 Boyles Famous Corned Beef Co. v. NLRB (8th Cir., 1968) 400 F2d 154, 69 LRRM 2218, enforced (1968) 168 NLRB No. 46, 67 LRRM 1030.

In the case of Venus Ranches (1977) 3 ALRB No. 55, we find the following pertinent discussion:

> "... can the Respondent be held liable for the independent acts of one of its employees who was neither a supervisor nor a manager of the Respondent? . . . Under applicable National Labor Relations Board precedent, . . . in order for an employer to be liable for an individual's acts, that individual must be shown in some manner to be an 'agent[1] of the employer. See N.L.R.B. v. Russell Manufacturing Company, 27 LRRM 2311 (C.A. 5, 1951). [1] Agency' has been loosely defined as acting under an employer's direction or control. 'Agency' has also been

> established where an employer has ratified, condoned, acquiesced in, or approved of the anti-union acts of an individual or group directed against his employees. Ratification or approval need not be express, and may be implied (Newton Brothers Lumber Company, 1557 (1953), enf'd 39 LRRM 2452 (C.A. 5, 1954); Jewell, Inc. 30 LRRM 1033 (1952)). By remaining silent and failing to disavow acts constituting unfair labor practices, or by neglecting to reprimand the employees who committed them, employers have been deemed to have acquiesced in, condoned or approved of such conduct and have been held responsible for the unfair labor practices committed. (See N.L.R.B. v. American Thread Co., 28 LRRM 1249 (1951) , enf'!! 204 F. 2d 169 (1953); Brewton Fashions, Inc., 54 LRRM 1329 (1963), enf'd 62 LRRM 2169 (C.A. 5, 1964)."

See also the dictum in Ernest J. Homen, et al (1978) 4 ALRB No. 27.

Having found Doris Jorgenson to be Respondent's supervisor and agent, it requires little additional discussion or legal authority to support my finding that she engaged in interrogation and/or surveillance when she called and conducted the meeting on December 23, 1977, circulated the anti-union petition, questioned Almazon about his and fellow workers' union views, and attended the union meetings in December of 1977. However, I cite the following additional support:

The interrogation of employees regarding their union sympathies and activities constitutes unlawful interference with protected activities unless taken by secret ballot with stated assurances against reprisals for the express purpose of determining the validity of a union's claim to majority status. NLRB v. Berggren and Sons, Inc. (8th Cir., 1969) 406 F2d 239, 70 LRRM 2338, cert, denied (1969) 396 U.S. 823, 72 LRRM 2431, approving NLRB rules set on in Struksnes Construction Co. (1967) 165 NLRB No.

102, 65 LRRM 1385; Arnaudo Bros., Inc., 3 ALRB No. 78. The court stated in Berggren;

> "'When an employer inquires into organizational activity whether by espionage, surveillance, polling, or direct questioning, he invades the privacy in which employees are entitled to exercise the rights given them by the Act. . . . When he questions an employee about Union organization or any concerted activities he forces the employee to take a stand on such issues whether or not the employee desires to take a position or has had full opportunity to consider the various arguments offered on the subject. . . . Moreover, employer interrogation tends to implant in the mind of the employee the apprehension that the employer is seeking information in order to affect his job security and the fear that economic reprisal will follow the questioning. . . . Interrogation thus serves as an implied threat or a warning to employees of the adverse consequences of organization and dissuades them from participating in concerted activity. It thereby undermines the bargaining agent chosen by the employees, thwarts self-organization, and frustrates employee attempts to bargain collectively.' These adverse effects can follow interrogation regardless of the employer's motive." 406 F2d at, 70 LRRM at 2341, internal quotation from the dissent in Blue Flash Express, Inc. (1954) 109 NLRB 591-97, 34 LRRM 1384.

Questioning which places an employee in the position of acting as an informant regarding union sympathies or co-workers will likewise be unlawful. Abex Corp. (1966) 162 NLRB 328, 64 LRRM 1004.

Surveillance of employees by an employer, whether with supervisors or rank and file workers or outsiders, has consistently been held to violate 8 (a) (1). Consolidated Edison Co. v. NLRB (1938) 305 U.S. 197, 3 LRRM 646. Surveillance is a violation regardless of whether the employees are aware of the conduct. NLRB v. Grower Shipper Vegetable Ass'n (CA 9, 1941) 122 F2d 368, 8 LRRM 891; NLRB v. Simplex Time Recorder Co. (CA 1, 1968) 401 F2d 547, 69 LRRM 2465. The Board has found an 8(a)(1) violation

for surveillance of union activities by supervisors who were motivated solely by their own curiosity and who were subsequently forbidden by the employer to continue the surveillance. Intertype Co. v. NLRB (CA 4, 1967) 371 F2d 787, 64 LRRM 2557. Similarly, an employer violates the Act if he encourages employees to engage in surveillance of union activities. Saginas Furniture Shops, Inc. v. NLRB (CA 7, 1965) 343 F2d 515, 58 LRRM 2417; NLRB v Saxe-Glassman Shoe (CA 1, 1953) 201 F2d 238, 31 LRRM 2271.

Surveillance of employees or giving the impression of surveillance is violative of Section 1153(a) in that it interferes with, restrains, and/or coerces employees in the exercise of their protected rights. Observing union activity has been held to be unlawful surveillance from a distance of 150 feet. Northwest Propane Co. (1972) 197 NLRB 87, 80 LRRM 1430. Actual surveillance of union activities has been held to violate the NLRA in a number of contexts. See, e.g., Allied Drum Service, Inc. Astro Container Co. Div. (1970) 180 NLRB No. 123, 73 LRRM 116; Standard Forge & Axle Co., Inc. (5th Cir., 1970) 427 F2d 344, 72 LRRM 2617, cert, denied (1970) 400 U.S. 903. The fact that the surveillance was not surreptitious does not make it any the less unlawful. NLRB v. Collins and Aikman Corporation (4th Cir., 1944) 146 F2d 454.

Furthermore, the NLRB has held that unlawful surveillance does not depend on any actual effect of the conduct upon employees. Gold Circle Department Stores (1973) 207 NLRB No. 147, 85 LRRM 1033.

I conclude, based upon all of the foregoing findings, cited law, and discussions, that Respondent, by and through its supervisor and agent, Doris Jorgenson, engaged in interrogation and surveillance of its employees regarding their union membership, activities, views, and sympathies in violation of §1153(a) of the Act.

The Remedy

Having found and concluded that Respondent engaged in certain unfair labor practices within the meaning of Sections 1153(a) and (c) of the Act, I recommend that Respondent be ordered to cease and desist therefrom and to take specific affirmative action designed to effectuate the policies of the Act, as set forth in my recommended Order.

The unlawful discharges of Jorge Valenzuela and John Almazon justify the issuance of an order that Respondent offer them immediate and full reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any losses they may have suffered as a result of their termination pursuant to the formula used in Sunnyside Nurseries, Inc. (1977) 3 ALRB No. 42, and in accordance with NLRB precedent. See F. W. Woolworth Co. (1950) 90 NLRB 289, and Isis Plumbing & Hearing Co. (1962) 138 NLRB 716.

The discriminatory discharges, interrogation, and surveillance committed by Respondent strike at the heart of the rights guaranteed to employees by Section 1152 of the Act. The

inference is warranted that Respondent maintains an attitude of opposition to the purposes of the Act with respect to justice, fair play, and the protection of employee rights. Therefore, I recommend that Respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed in Section 1152 of the Act.

Additionally, I recommend that the workers be notified of the Board's findings, conclusions, and orders by the posting, mailing, and reading of the NOTICE TO EMPLOYEES attached hereto as "APPENDIX" in accordance with the specific steps set forth in my recommended Order and pursuant to the rationale of Tex-Cal Land Management, Inc. (1977) 3 ALRB No. 14, the cases cited therein, and its progeny; and that Respondent notify the Regional Director of its compliance efforts.

Upon the basis of the entire record, the findings of fact and conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that the Respondent, American Garden Perry's Plants, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

a. Discouraging membership of any of its employees in the United Farm Workers of America, AFL-CIO, or any other labor organization, by discharging, laying off, or in any other manner discriminating against employees with respect to their hire or tenure of employment or any other term or condition of employment, except as authorized in Section 1153 (c) of the Act.

b. Interrogating employees and engaging in surveillance of employees regarding their union membership, activities, views, and sympathies.

c. In any other manner interfering with, restraining, or coercing employees in the exercise of those rights guaranteed them by Section 1152 of the Act.

2. Take the following affirmative actions which will effectuate the policies of the Act:

a. Offer to Jorge Valenzuela and John Almazon immediate and full reinstatment to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any losses they may have suffered as a result of their termination pursuant to the formula used in Sunnyside Nurseries, Inc. (1977) 3 ALRB No. 42.

b. Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to determine the back pay due to the two employees named above.

c. Sign the Notice to Employees attached hereto which, after translation by the Regional Director into Spanish and other appropriate languages, shall be provided by Respondent in sufficient numbers in each language for the purposes set forth hereinafter.

d. Within 30 days from receipt of this Order, mail a copy of the Notice in appropriate languages to each of the employees on its current payroll, as well as to all its 1976 and 1977 peak-season employees.

e. Post copies of the attached Notice in all appropriate languages in conspicuous places on its property, including places where notices to employees are usually posted, for a 60-day period to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced or removed.

f. Permit an agent of the Board to distribute and read this Notice in all appropriate languages to its employees assembled on company time and property, at times and places to be determined by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the

employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

g. Notify the Regional Director in writing, within 30 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: June 12, 1978.

ROBERT A. D'ISIDORO
Administrative Law Officer

APPENDIX

NOTICE TO EMPLOYEES

After a hearing in which all parties presented evidence, the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relaions Act, and has ordered us to notify our employees that we will respect their rights under the Act in the future. Therefore, we are now telling each of you:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join or help unions;
3. To bargain as a group and choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help or protect one another;
5. To decide not to do any of these things.

Because you have these rights, we promise that we will not do anything else in the future that forces you to do, or stops you from doing, any of the things listed above; expecially we will not use any of our supervisors or agents to interrogate you or engage in surveillance of you regarding your union membership, activities, views, and sympathies; and we will not discharge or lay off any of you because you are members of or support the UFW and/or engage in the protected activities listed above.

The Agricultural Labor Relations Board has found that we discriminatorily discharged Jorge Valenzuela and John Almazon because they supported the UFW and engaged in protected activities; therefore, we will offer Jorge Valenzuela and John Almazon full reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and we will pay them for any losses they may have suffered as a result of their discharges.

Dated: AMERICAN GARDEN PERRY'S PLANTS, INC.

By _____
Representative Title

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.